MISSISSIPPI CODE 1942

"Sec. 9312. Definitions.—When the terms "corporation," "association," or "joint stock company" are used in this Act, the same shall mean and include each and every form or organization for pecuniary gain, having capital stock represented by shares, whether with or without par value, having privileges not possessed by individuals or partnerships; and whether organized under, or without statutory authority; and may be referred to as "organization."

"When the term "doing business" is used in this Act, it shall mean and include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust.

"SOURCES: Laws, 1934, ch. 121.

"CROSS REFERENCES: Burial Associations, Sec. 5599; Insurance, Sec. 5670; Privilege Tax Code, Sec. 9429; Revenue, Sec. 9760."

"Sec. 9314. Tax on foreign corporations.—For the year 1940 and annually thereafter, there shall be and is hereby imposed, levied and assessed upon every corporation, association or joint stock company, as hereinbefore defined, organized and existing under and by virtue of the laws of some other state, territory or country, or organized and existing without any specific statutory authority, now, or hereafter doing business within this state, as hereinbefore defined, a franchise or excise tax equal to $1.50 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed within this state,

except as hereinafter provided. It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state.

"SOURCES: Laws, 1934, ch. 121; 1940, ch. 115.

"CROSS REFERENCES: Sec. 9319, infra, this title.

"REFERENCES: 26 RCL 163, Taxation, Secs. 133, 134."

"SEC. 9313. TAX ON DOMESTIC CORPORATIONS. — There is hereby imposed, to be paid and collected as hereinafter provided, a franchise or excise tax upon every corporation, association, or joint stock company for picuniary gain, having privileges not possessed by individuals, and having capital stock represented by shares, now existing in this state, or hereafter organized, created or established, under and by virtue of the laws of the State of Mississippi, equal to $1.50 for each $1,000.-00 or fraction thereof, of the value of the capital used, invested or employed in the exercise of any power, privilege or right enjoyed by such organization within this state, except as hereinafter provided. It being the purpose of this section to require the payment to the state of Mississippi, this tax for the right granted by the laws of this state to exist as such organization, and enjoy, under the protection of the laws of this state, the powers, rights, privileges and immunities derived from the state by the form of such existence.

"SOURCES: Laws, 1934, ch. 121; 1940, ch. 115.

"REFERENCES: 26 RCL 159 et seq., Taxation, SS 130 et seq."

"STONE, CHAIRMAN OF TAX COMMISSION, v. MEMPHIS NATURAL GAS CO., 1947. In Banc 201 Miss. 670, 29 So. (2d) 268.

"APPEAL from the circuit court of Hinds County.

"HON. H. B. GILLESPIE, Judge.

"Proceeding by Memphis Natural Gas Company against A. H. Stone, Chairman, Tax Commission, for review of an order of the commission adjudging company liable for payment of corporation franchise taxes. From an adverse judgment, the commission appeals. Reversed and judgment entered for the commission.

GRIFFITH, J., delivered the opinion of the court.

"Appellee, a Delaware corporation, owns and operates a natural gas pipe line running from the Monroe gas field in Louisiana to Memphis in the State of Tennessee, and beyond. The pipe line enters Mississippi at a point a few miles south of Greenville, and runs thence, in this State, towards the north in a general direction parallel with the Mississippi River, and enters Tennessee at a point almost directly south of Memphis. The map of the line, made a part of the record, shows that there are approximately 135 miles of it in this State, and that the system includes two compressing stations at points in this State.

"There is a stipulation in the record covering the further facts, and these are that appellee company is not, and has not been, engaged in any intrastate commerce in Mississippi, but that its business, so far as concerns this State, has been interstate solely and exclusively; that it has only one customer in the State, and to this customer it delivers gas wholesale, under a contract made in another state; that appellee company has not been domesti-

cated or qualified as a foreign corporation with the right to dointrastate business; has no agent for service of process and has not had any such agent, and has maintained no office, in this State; and that it has no employes or representatives in this State other than those necessary to maintain the pipe line and its related facilities.

"The State, through its Tax Commission, has demanded of appellee company the payment of the corporation franchise tax imposed under Secs. 9312-9340, Code 1942, for the years 1942, 1943 and 1944, and has entered its order adjudging appellee liable therefor, from which order appellee under Sec. 9328, has appealed for a review by the courts, contending that inasmuch as appellee does no intrastate business whatever in Mississippi, and is not qualified to do any intrastate business therein, no tax of any kind can be levied by the State against it other than the ad valorem taxes which it has always fully paid—that any other tax, and particularly a franchise tax, would be to tax interstate commerce.

"The franchise tax here sought to be collected by the State is not a tax upon "doing business" as that term is ordinarily understood in the purely commercial sense, but is that which is defined in the statute Secs. 9312 and 9314, as follows: "When the term 'doing business' is used in this Act, it shall mean and include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust."

"It is to be seen that there is no attempt to tax interstate commerce as such, but the levy is an exaction which the State requires as a recompense for its protection of

lawful activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State.

"*This statutory definition was first approved in the connection here involved as within the power of the State in Stone v. Interstate Natural Gas Co.*, 5 *Cir.*, 103 *F.* (2*d*) 544, *affirmed* 308 *U. S.* 522, 60 *S. Ct.* 292, 84 *L. Ed.* 442. *Subsequently, in a connection equally pertinent in principle, it was approved and sustained by the Court in Stone v. General Contract Purchase Corp.*, 193 *Miss.* 301, 312, 7 *So.* (2*d*) 806, 140 *A.L.R.* 1029, *and in Stone v. General Electric Contracts Corp.*, 193 *Miss.* 317, 7 *So.* (2*d*) 811; *it being further held in the latter case that when the incidental local activities come within the definition, it would be immaterial that the foreign corporation had no local agents, and has no office, and is not qualified to do any intrastate business in this State.* (Emphasis ours)

"It has often been observed in times past that interstate commerce should pay its way, should be made to bear a fair share of the cost of local government whose protection it enjoys, but outside of ad valorem taxes and until recently most efforts to make it pay its way have met with failure. In late years, however, there is a tendency to uphold local taxation when it does not bear directly upon interstate commerce as commerce, or when indirect, it has no substantial effect to block or impede the free flow of such commerce.

"And more recently there has been a pronounced trend that, in order to make a more reasonable accomodation

between local needs and the dominant requirement of freedom in the national commerce, recognition shall be given to a rule as follows: That although a particular activity may be essential to the continued full and unimpeded flow of commerce between the states as regards a particular commodity or other matter of such commerce, yet if that activity is of a substantial character, and is one which actually and distinctly happens in the particular State and must be, and is, protected by that State regardless of the ultimate purpose of the activity, then for the purpose of laying a tax as a recompense for the local protection afforded, the State may detach the activity so long as the exaction on account of it is not made a pretext to impose a burden which would have the effect, beyond that which is remote or unsubstantial, to interfere with the national interests.

"The present case may be reduced, therefore, to two questions: (1) Are the incidental local activities carried on by appellee corporation in this State substantial in nature and extent,—the active maintenance, supervision and repair in this state of 135 miles of pipe line and its related equipment? An affirmative answer to that question is obvious. (2) Does the franchise tax here demanded amount to enough to have any substantial effect to block or impede the free flow of commerce, or is it at all out of reasonable proportion to the services and protection which must be furnished by the State in and about the stated local activities? The franchise tax demanded is approximately $3,400 per annum, whereas the ad valorem taxes are approximately $82,000 a year, whence the obvious answer to this last question must be in the negative.

"Reversed and judgment here for appellant."

FILED
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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 179

J. P. COLEMAN, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, *Petitioner*,

v.

TRUNKLINE GAS COMPANY, *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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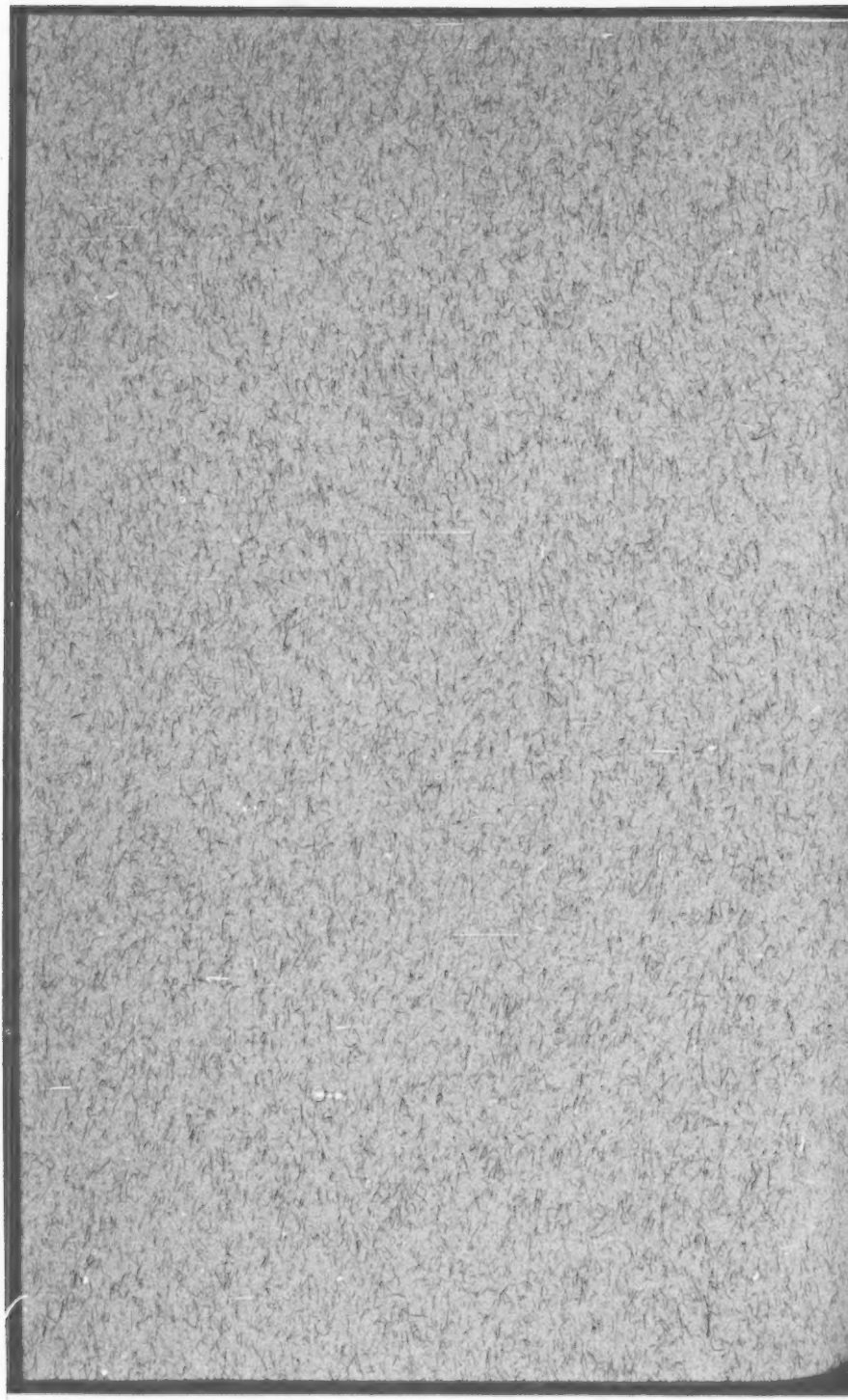

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Statement of the Case

The Chairman of the State Tax Commission of Mississippi, as Tax Commissioner, on August 1, 1952, adopted and entered an order and tentative assessment whereby there was imposed upon the Respondent a privilege tax under Section 34 of the STATE WIDE PRIVILEGE TAX LAWS OF MISSIS-

SIPPI [1] in the amount of $11,040.75 (R. Pg. 2). Respondent, within the time and in the manner provided by the Mississippi law, filed its written objection to and protest against such tentative assessment against it (R. Pgs. 13, 18). Respondent set forth in such objection the following facts upon which it based its objection to the assessment of the tax:

> "Trunkline Gas Company is a natural gas company as defined in the Natural Gas Act of 1938, 15 USCA, Section 717-717w, and it has heretofore constructed and is now operating a natural gas pipe line in interstate commerce pursuant to a Certificate of Public Convenience and Necessity issued by the Federal Power Commission in Docket No. G-882 on May 4, 1950. Such certificate authorized such Company to construct and operate a natural gas pipe line from McAllen in the State of Texas, through Louisiana, Arkansas, Mississippi, Tennessee and Kentucky, terminating near Tuscola, Illinois. Pursuant to such certificate, this Petitioner constructed said natural gas pipe line, as authorized by the Federal Power Commission, and on October 1, 1951 commenced the transportation of natural gas in interstate commerce through the aforementioned states, all as authorized by such Certificate of Public Convenience and Necessity. All of the business of such Company in the State of Mississippi is solely and exclusively in interstate commerce. Your Petitioner does not buy, sell, produce or distribute gas or any other product, nor does it conduct any activity of a local nature in the State of Mississippi. Your Petitioner has not domesticated itself as is provided for in

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[1] Laws of Mississippi, 1944, Ch. 38, § 34, as amended by House Bill No. 34, Mississippi Legislature, Regular Session 1952, entitled "An Act to Amend Section 34, Chapter 138, Laws of 1944, So as to Increase the Privilege Tax on Pipe Line Companies and to Levy a Graduated Tax Based Upon the Size of Pipe Lines Carrying Crude Oil, Liquid Petroleum Products and Natural or Artificial Gas." The pertinent sections of the State Wide Privilege Tax Laws are set forth in the Appendix.

Section 5339 et seq. of the Mississippi Code of 1942, nor has it filed its charter with the Secretary of State as is required by Section 5343 of the Mississippi Code of 1942 for foreign corporations doing an intrastate business in the State of Mississippi. This Company pays or will pay to the State of Mississippi for the year 1952 for the benefit of that State and in full compensation for any powers, privileges or protection afforded it in its interstate activities under the laws of the State of Mississippi the following estimated or actual amounts which are computed to be due pursuant to the provisions of the Mississippi Code of 1942:

"Ad Valorem Tax (including counties and local taxing authorities which are entitled to participate in the ad valorem tax under the Mississippi law)	$144,150.00
"Franchise Tax, pursuant to Chapter 2, of Title 37	4,711.40
"Income Tax	21,477.00

"The Company has within the State of Mississippi 153 miles of 24-26 inch natural gas pipe line and, in addition to the above taxes, you, as Tax Commissioner, have determined and demanded that this Company pay an additional sum of $11,040.75 pursuant to Section 34 of the State Wide Privilege Taxes Law of 1944, as amended."

(R. Pgs. 13-14).

The Respondent in such written objection resisted the assessment of such tax for the reasons that:

(1) The tax is laid upon the privilege of engaging in the business of transporting natural gas in interstate commerce in the State of Mississippi (R. Pg. 15);

(2) That H. B. 34 under which the assessment was made is an attempt by the State of Mississippi to require the payment of a tax from the Respondent for the privilege of engaging in interstate commerce when such right and privilege is guaranteed to the Respondent by the Constitution and laws of the United States and that such attempted assessment is violative of the Commerce Clause of the Constitution of the United States (R. Pg. 15);

(3) That the attempted assessment is invalid for the reason that it discriminates against the Respondent which is engaged wholly in interstate commerce in favor of any person, firm or corporation mining or producing gas or oil in Mississippi on which a privilege tax measured by the gross production thereof is imposed and paid in Mississippi (R. Pg. 15);

(4) That said attempted assessment is also in violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States because such action selects the Respondent for discriminatory treatment by subjecting it to taxes not imposed on others of the same class (R. Pg. 16).

On September 2, 1952, the Tax Commissioner of the State of Mississippi heard the protest and the reasons therefor and found that "notwithstanding the facts set out in said protest, *which facts are found to be correct,* the protest should be denied and overruled and the assessment be made final and approved as provided by H. B. 34 of the Acts of the Legislature for 1952." (R. Pg. 19) The matter was brought before the Circuit Court of Hinds County by certiorari (R. Pgs. 19-22) and by its final order entered on September 18, 1952 (R. Pg. 22) that court found:

"* * * and it appearing from the record in this cause

> that the pipe lines of Petitioner (Respondent) upon which said assessment is based, are used solely and exclusively for the transportation of natural gas in interstate commerce and the tax sought to be imposed upon Petitioner is unconstitutional, null and void;"

and adjudged that the attempted assessment was unconstitutional, null and void and reversed the action of the State Tax Commissioner in making such assessment.

The Supreme Court of Mississippi, by its opinion on Suggestion of Error rendered March 2, 1953, reported in 63 So. 2d 73, stated the question involved in this proceeding as follows:

> "The sole question presented is whether the State may validly exact a privilege tax from a person or corporation engaged solely and exclusively in interstate business." (R. Pg. 72)

and held that the tax involved was strictly a privilege tax and that the attempted assessment against Respondent was unconstitutional and affirmed the action of the Circuit Court of Hinds County (R. Pgs. 71-78). The Court did not reach the other objections presented by Respondent in its protest.

All of the pertinent facts involved in this case are set forth in the written protest of Respondent (R. Pgs. 13-17). At pages 9-10 of the petition, the Petitioner set forth as facts certain conclusions not apparent of the record, of which it asks this Court to take judicial notice. While Respondent cannot agree either with the conclusions of fact of which Petitioner requests this Honorable Court to take judicial notice or the propriety of this Court taking judicial notice of such purported facts, the Respondent's view of the matter is that even if such facts are considered that in view of the nature of H. B. 34, under which the assessment was

attempted to be made, such facts are irrelevant. All activities of the Respondent in Mississippi are solely and exclusively in interstate commerce, as found by the State Tax Commission (R. Pg. 19), the Circuit Court of Hinds County (R. Pg. 22), and the Supreme Court of Mississippi.

ARGUMENT

I.

The Circuit Court of Hinds County and the Supreme Court of Mississippi correctly Held That H. B. 34 is Strictly a Privilege Tax and is Levied Upon Respondent for the Privilege of Engaging Exclusively in Interstate Business in the State of Mississippi

The Circuit Court of Hinds County held (R. Pgs. 22-23) and the Supreme Court of Mississippi found and held, "There can be no question that the tax here involved is strictly a privilege tax" (R. Pg. 73) and is levied upon Respondent for the privilege of engaging exclusively in an interstate business (R. Pgs. 71-78). The Mississippi courts followed the applicable decisions of this Court in STATE TAX COMMISSION v. INTERSTATE NATURAL GAS COMPANY, INC., 284 U.S. 41; SPECTOR MOTOR SERVICE, INC., v. O'CONNOR, 340 U.S. 602; MEMPHIS STEAM LAUNDRY CLEANERS, INC., v. STONE, 342 U.S. 389; INTERSTATE OIL PIPE LINE COMPANY v. STONE, 337 U.S. 662, and held the attempted levy unconstitutional and void. H. B. 34 is a part and parcel of the State Wide Privilege Tax Law which this Court had before it in MEMPHIS STEAM LAUNDRY CLEANERS, INC., v. STONE, supra. The pertinent sections of this law have been set forth in the Appendix. If the Respondent desires to engage in the business of or exercise the privilege of operating a pipe line or transporting gas through

a pipe line, even though such activities are wholly in interstate commerce, it must first apply for and secure from the Tax Commissioner of Mississippi a privilege license authorizing it to engage in such business or to exercise such privilege (§§ 3, 27, 34, 35, 48, 54, 66, Appendix Pgs. i, iii, vi, x, xi, xiii, xiv, xv. If the Respondent does not pay the tax and secure a proper license from the State of Mississippi authorizing it to engage in its business (which is admittedly exclusively in interstate commerce), the Respondent cannot engage in interstate commerce in and through the State of Mississippi. If the Respondent is in error in the position that it has taken herein, the Mississippi law subjects it to an extreme fifty per cent (50%) penalty (§ 54, Appendix Pgs. x, xi, xii) and furthermore its act in engaging exclusively in interstate commerce without such a license is made a criminal offense (§ 66, Appendix Pgs. xiii, xiv). The decisions of this Court have never allowed a state to impose or to levy such a tax for the privilege of engaging in interstate commerce. INTERSTATE OIL PIPE LINE COMPANY v. STONE, supra; MEMPHIS NATURAL GAS CO. v. STONE, 335 U.S. 80. The Circuit Court of Hinds County and the Supreme Court of Mississippi correctly followed the applicable decisions of this Court.

II.

The Interpretation of H. B. 34 by Both the Circuit Court of Hinds County and the Supreme Court of Mississippi is a Reasonable Interpretation and is Binding Upon This Honorable Court

Under the applicable decisions of this Court, the interpretation of H. B. 34 by the Supreme Court of Mississippi being reasonable and not being made to evade a contrary

ruling under the Federal Law, its interpretation of the Act is binding upon this Court. MEMPHIS NATURAL GAS v. STONE, supra; INTERSTATE OIL PIPE LINE COMPANY v. STONE, 337 U.S. 662 at page 671; MEMPHIS STEAM LAUNDRY CLEANER, INC., v. STONE, supra; SOUTHERN NATURAL GAS CO. v. ALABAMA, 301 U.S. 148, 153; SPECTOR MOTOR SERVICE, INC., v. O'CONNOR, supra.

In his brief the Petitioner seeks to overturn the interpretation given to H. B. 34 by both the trial court and the Supreme Court of Mississippi and would have this Court determine that H. B. 34 was levied as a "tax upon the privilege of exercising local rights and powers, local activities in Mississippi and receiving locally in Mississippi the benefit and protection of the government and laws of Mississippi." If, indeed, the Supreme Court of Mississippi had given H. B. 34 the interpretation which is now pressed upon this Court by Petitioner this Court would have been required to reject such interpretation as a palpable evasion for avoiding the impact of SPECTOR and the cases following it. The interpretation given by the Mississippi courts to H. B. 34 is the only reasonable interpretation that can be given to the Act. The theory of the Petitioner which is set forth in the dissenting opinion of the Supreme Court of Mississippi was pressed upon both the Mississippi courts and rejected by each of them.

The Supreme Court of Mississippi found unequivocally that H. B. 34 was a privilege tax levied upon Respondent for the privilege of engaging exclusively in interstate commerce in Mississippi (R. Pg. 73) and that the adoption of the Act was an apparent effort to circumvent the effect of the applicable decisions of this Court which had condemned such privilege taxes (R. Pg. 74).

In the INTERSTATE case in 284 U.S. this Court, per Holmes, Judge, held the antecedent of H. B. 34, Section

163, Chapter 88, Laws of 1930,[2] unconstitutional. This Act was amended by the laws of 1944 which the Supreme Court of Mississippi termed "almost an exact rescript of Section 163, Chapter 88, Laws of 1930." [3] (R. Pg. 73). Mississippi made no attempt to tax the interstate pipe lines under the 1944 Act (R. Pg. 73).

§ 3 of the Act provides:

> "PRIVILEGE TAXES IMPOSED.—Every person desiring to engage in any business, or exercise any privilege hereafter specified shall first, before commencing same, apply for, pay for, and procure from the state tax commissioner or commissioner of insurance, a privilege license authorizing him to engage in the business or exercise the privilege specified therein, and the amount of tax shown in the following sections is hereby imposed for the privilege of engaging or continuing in the business set out therein."

§ 34 (H. B. 34) of the Act provides in part as follows:

> "Upon each person *operating* a pipe line in or through this state or *engaged in transporting* in or through this state crude oil, liquid petroleum products, and natural or artificial gas through pipes or conduits, for the privilege of exercising or enjoying such right and power in this state. * * * ".

To the foregoing language, which is in substance the same as the 1930 and 1944 Acts, there has been added:

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[2] Chapter 88, Section 163, Laws of 1930: SEC. 163, PIPE LINE COMPANY.—Upon each person engaging and/or continuing in this state in the business of operating a pipe line or transporting in or through this state, oil, or natural, or artificial gas, through pipes, and/or conduits, a tax as follows:".

[3] Chapter 138, Section 34, Laws of Mississippi, 1944: "PIPE LINE COMPANIES. Sec. 34. Upon each person engaging or continuing in this state in the business of operating a pipe line, or transporting gas in or through this state oil, or natural or artificial gas through pipe or conduits, a tax as follows:".

> "and for the privilege of enjoying and receiving the benefit and protection of the government and laws of this state there is levied a tax in addition to all other taxes."

The only perceivable difference between the 1930 Act held unconstitutional in INTERSTATE 284 U.S. and H. B. 34 is the addition of the last quoted language. The entire argument of the Petitioner and the dissent in the Mississippi Supreme Court stems from the 3-judge opinion in the undecisive case of MEMPHIS NATURAL GAS v. STONE, supra. Can the addition of such language transform an unconstitutional act into a valid levy? We think not. Irrespective of whether Mississippi can levy a tax upon an interstate pipe line for the protection and benefit afforded it by the laws of Mississippi, it is certain that it cannot do so when the Act requires the taxpayer to secure a license from the State of Mississippi to engage in a wholly interstate business. Under H. B. 34 the tax is levied upon Respondent for the privilege of exercising or enjoying the right and power in Mississippi to *operate its lines* or to *transport gas through such lines*. The operation of the line and the transportation of the gas is one and the same thing. Under H. B. 34, unless the taxpayer is *operating* a pipe line or engaged in *transporting* gas through Mississippi by means of a pipe line, no tax would be payable. The ownership of the pipe line itself would not give rise to a levy under H. B. 34. It is the operation or the transportation, the very act of engaging in interstate commerce, for which the taxpayer must first secure a license from the State. This was what this Court prohibited in the INTERSTATE case in 284 U.S. In MEMPHIS NATURAL GAS CO. v. STONE, supra, Mr. Justice Reed in distinguishing the 1930 Act from the sections of the Mississippi Code[4] under consideration in that case said:

[4] Sections 9313-9314 (1942), Appendix (Pgs. xiv, xv).

> "Mississippi sought to tax Respondent under a privilege tax that required the pipe line company to get a license to exercise the privilege desired, that is to operate an interstate pipe line. This Court held that the entire business of the Respondent was interstate despite a claimed local activity by the reduction of pressure to deliver gas to the Mississippi distributors. It followed that the state license for the privilege of engaging in the business of operating a pipe line was an invalid burden under the Commerce Clause."

The operating incidence of H. B. 34 is precisely the same as the 1930 Act. As is pointed out by the Supreme Court of Mississippi in the majority opinion, the only thing that has been added by H. B. 34 are the words "for the privilege of enjoying and receiving the benefit and protection of the government and laws of this state." (R. Pg. 74). Obviously, the draftsmen of H. B. 34 were seeking to levy a tax solely upon the interstate pipe line companies and adopted the language from MEMPHIS NATURAL GAS v. STONE, supra, in an attempt, as was pointed out by the Mississippi Supreme Court, to circumvent the applicable decisions of this Court (R. Pg. 74). If an invalid and unconstitutional levy can be transformed into a valid and constitutional levy by the addition of such language or similar language, then any state may tax interstate commerce freely and without regard to the impact upon that commerce by simply stating that such tax is also levied for the protection and benefits afforded by the laws of the state. From the uncontroverted facts, it appears that Respondent paid to the State of Mississippi in 1952 ad valorem taxes, franchise taxes and income tax in the aggregate of $170,338.50, or greatly in excess of $1,000 per mile of the pipe line of the company in Mississippi. It would appear that the company is now paying substantially for the benefit and protection of the gov-

ernment and laws of the State of Mississippi. In its protest the Respondent stated:

> " * * * This Company pays or will pay to the State of Mississippi for the year 1952 for the benefit of that State and in full compensation for any powers, privileges or protection afforded it in its interstate activities under the laws of the State of Mississippi the following estimated or actual amounts which are computed to be due pursuant to the provisions of the Mississippi Code of 1942:"

The Tax Commissioner found these facts to be true (R. Pg. 19). The Supreme Court of Mississippi found:

> " * * * By payment of the franchise tax the appellee has, in effect, purchased the right to receive the benefit and protection of the government and laws of this State. The tax sought to be imposed by the 1952 law is for identically the same privilege and does not confer upon appellee a single right or benefit which it has not already obtained by the payment of its franchise tax, its ad valorem tax and its income tax on its earnings in proportion to its investment in and its flow of business through Mississippi. Payment of the franchise tax conferred upon appellee the right to receive from the State the protection of its local activities in maintaining, keeping in repair, and in manning the facilities of its system through the State, the right to acquire rights of way by eminent domain or private purchase, protection by the State against acts of vandalism, and, in fact, every other right which it enjoys." (R. Pg. 75)

The decision of the Mississippi Supreme Court did not rest upon the ground that Respondent had already paid for the protection and benefits afforded it by the State of Mississippi, but upon the broad base that, irrespective of what language or frills are added, the State of Mississippi is

without the power to impose a tax upon the Respondent for the privilege of engaging exclusively in interstate commerce and the decision of such Court should be left undisturbed.

III.

H. B. 34 Discriminates Against Interstate Commerce

The majority opinion of the Supreme Court of Mississippi did not reach the point raised in Respondent's protest that H. B. 34 is unconstitutional and invalid for the reason that the same discriminates against Respondent in favor of any person, firm or corporation mining or producing gas or oil on which a privilege tax measured in gross production is imposed and paid in Mississippi (R. Pgs. 15-16). It is provided in H. B. 34 that:

> "and this section shall not apply to those persons, firms or corporations mining or producing gas or oil on which a privilege tax measured by gross production is imposed and paid in this state."

The Respondent stated in its protest:

> "Any such pipe line company of the same class as plaintiff (Respondent) which mined or produced any quantity of gas or oil in the State of Mississippi upon which it paid the gross production tax, irrespective of the amount thereof, is exempt from the privilege tax sought to be levied by said Section 34." (R. Pg. 15-16)

These facts were found to be true by the Tax Commissioner (R. Pg. 19). This Court has held that the production of oil or gas is intrastate commerce. HOPE NATURAL GAS COMPANY v. HALL, 274 U. S. 284. The production of oil or gas is admittedly intrastate commerce and the payment

of any amount of gross production taxes on such production would exempt a taxpayer so engaged in intrastate commerce from paying the tax sought to be levied by H. B. 34. Mississippi is a large producer of oil and gas and the tax on its face discriminates against interstate commerce in favor of the local producers of oil and gas in Mississippi even though they may be engaged in the operation of a pipe line or the transportation of gas to the same extent as Respondent. Section 34 is unconstitutional as being a tax levied upon the privilege of engaging in interstate commerce and for discriminating against interstate commerce. MEMPHIS STEAM LAUNDRY CLEANER, INC. v. STONE, supra, and cases cited therein.

Conclusion

For the reasons hereinabove set forth, it is respectfully submitted that the petition for certiorari should be denied as the decision of the Supreme Court of Mississippi is not upon a matter of substance which has not heretofore been determined by this Court, but is simply a decision made in harmony with the applicable decisions of this Court.

Respectfully submitted,

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APPENDIX

Laws 1944, ch. 138, § 3:

PRIVILEGE TAXES IMPOSED.—Every person desiring to engage in any business, or exercise any privilege hereafter specified shall first, before commencing same, apply for, pay for, and procure from the state tax commissioner or commissioner of insurance, a privilege license authorizing him to engage in the business or exercise the privilege specified therein, and the amount of tax shown in the following sections is hereby imposed for the privilege of engaging or continuing in the business set out therein. (Supersedes § 9429, Code of 1942.) Laws, 1940, ch. 120; 1944, ch. 138, § 3.

§ 27:

PUBLIC UTILITIES.—There is hereby imposed and levied and shall be collected annual privilege taxes, in addition to any and all other taxes imposed by law upon the persons, firms, co-partnerships, associations, or corporations, for the privilege of carrying on and continuing the businesses, activities, and exercising powers and rights under the laws of the state of Mississippi, which said tax shall be levied and collected as herein provided. (Supersedes § 9599, Code of 1942.) Laws, 1940, ch. 120; 1944, ch. 138, § 27.

H. B. 34, 1952, ch. 410, §§ 1, 2 amending Laws 1944, ch. 138, § 34:

An Act to Amend Section 34, Chapter 138, Laws of 1944, So as to Increase the Privilege Tax on Pipe Line Companies and to Levy a Graduated Tax Based Upon the Size of Pipe Lines Carrying Crude Oil, Liquid Petroleum Products and Natural or Artificial Gas.

Be It Enacted by the Legislature of the State of Mississippi:

Section 1. That section 34, chapter 138, laws of 1944, be and the same is hereby amended to read as follows:

Section 34. Upon each person operating a pipe line in or through this state or engaged in transporting in or through this state crude oil, liquid petroleum products, and natural or artificial gas through pipes or conduits, for the privilege of exercising or enjoying such right and power in this state, and for the privilege of enjoying and receiving the benefit and protection of the government and laws of this state, there is levied a tax, in addition to all other taxes, as follows:

On each mile of pipe having a diameter of less than twelve (12) inches ..... $ 15.00

On each mile of pipe having a diameter of twelve (12) inches and less than fifteen (15) inches .... $ 37.50

On each mile of pipe having a diameter of fifteen (15) inches and less than twenty (20) inches .... $ 52.50

On each mile of pipe having a diameter of twenty (20) to twenty-six (26) inches, inclusive ..... $ 75.00

On each mile of pipe having a diameter of over twenty-six (26) inches $125.00

The term "pipe line" as used in this section shall apply to both interstate and intrastate trunk lines, but shall not apply to those pipe lines, known as service lines, used solely for distributing gas or other petroleum products in or near cities, towns, and villages to the ultimate consumer. And this section shall not apply to those persons, firms or corporations mining or producing gas or oil on which a privilege tax measured by gross production is imposed and paid in this state.

Section 2. If any part, section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the

remaining portions of this act. It is hereby declared that this act would have been passed irrespective of the fact that any one or more parts, sections, subsections, sentences, clauses or phrases are declared unconstitutional or invalid.

Section 3. This act shall take effect and be in force from and after its passage.

§ 35:

APPLICATION MADE TO TAX COMMISSIONER.—Each person required by the foregoing eight sections to pay a privilege tax for doing business in this state, shall annually, on or before the first day of June in each year, under oath, make and file with the tax commissioner an application upon blanks prescribed and furnished by and in such form as the tax commissioner may prescribe, which shall contain:

1. The name of the company.

2. The nature of the company, whether a person or persons, or association or corporation, and under the laws of which state or county organized.

3. The location of its principal office.

4. The name and post office address of the president, secretary, auditor, treasurer and superintendent, or general manager.

5. The name and post office address of the chief officer or managing agent of the company in this state.

6. The entire gross earnings, including all sums earned or charged, whether actually received or not, for the next preceding calendar year or fiscal year from every source derived, and business done within this state; and the total gross earnings of such persons, firms, or corporations for such period.

7. The total number of miles of railroad track operated

within and without this state; the total number of miles of gas mains or pipe lines, and the diameter of same, specifying the number of miles of each diameter of pipe, or total number of miles of railroad over which its business is carried, or its cars operated; or the total number of pole miles; but each person shall be required to furnish in his application only the information pertaining to his operation; and such other and further information as the tax commissioner may require. (Supersedes § 9607, Code of 1942.) Laws, 1940, ch. 120; 1944, ch. 138, § 35.

§ 36:

TAX COMMISSIONER TO DETERMINE AMOUNT OF TAX.—The tax commissioner shall annually on the first Monday in July, or as soon thereafter as is practicable, but not later than the first Monday in August of each year, classify the several railroads and the branches thereof, operating through this state, in proportion to the gross earnings of volume of business of each, into ten classes, numbered consecutively from one to ten; and at the same time shall ascertain and set forth the units to be used in determining the tax due to be paid by the public utilities or persons hereinbefore mentioned, and make such classification of the same as will clearly show the amount of tax to be paid by each public utility, or person, and shall enter his findings in a suitable book, and the same, when made, shall remain open and subject to objections thereto, if any, which must be filed in writing by the taxpayers, for a period of thirty days.

It shall be the duty of the tax commissioner to hear and determine all objections filed, and he may make such correction in his determination, classification, findings, or order, as he may deem proper, and his decision in the matter shall be final, except as to the right of such order, or findings to be reviewed by a court of competent jurisdiction. The

findings, determination and classification as made by the said tax commissioner shall be entered in a suitable book, and a copy thereof certified to the auditor of public accounts to be preserved by him as a record in his office, for the purpose of auditing the proper tax to be collected from the respective taxpayers affected by said order. (Supersedes § 9608, Code of 1942.) Laws, 1940, ch. 120; 1944, ch. 138, § 36.

§ 37:

TAXES MAY BE PAID FOR PART OF YEAR.—If at any time any person liable for a tax under the nine preceding sections shall increase its classifications so as to require the payment of an additional tax, or shall begin business or construct, or operate additional taxable units, application shall be made to the tax commissioner for additional privilege license, and upon the determination by the tax commissioner of the amount of tax due, shall pay the same. The tax commissioner shall issue such privilege license to expire on December first following, and shall collect the pro rata annual tax according to the number of months between the date of liability and December first following. (Supersedes § 9609, Code of 1942.) Laws, 1940, ch. 120; 1944, ch. 138, § 37.

§ 38:

TAXES TO BE PAID.—It shall be the duty of the tax commissioner to send a notice to each such taxpayer of the amount of privilege taxes due by him, and the said tax shall be paid on or before the first day of December in each year, (except as provided in the next preceding section), but failure to receive said notice shall not exempt any taxpayer from the payment of damages as imposed by this act. Upon the payment of the said tax, the tax commissioner shall issue a state-wide license as herein provided.

The privilege tax herein imposed by the foregoing sections on telephone, railroad, telegraph, sleeping car, express, electric light and power companies, and pipe line companies shall be for a state-wide purpose, and no board of supervisors, nor municipality shall levy any privilege tax upon any of said companies. (Supersedes § 9610, Code of 1942.) Laws, 1940, ch. 120; 1944, ch. 138, § 38.

§ 47:

LICENSE: WHERE OBTAINED.—All licenses required by this act shall be obtained from the tax commissioner or the commissioner of insurance, except in cases where the law provides that some other officer shall issue the license. (Supersedes § 9666, Code of 1942.) Laws, 1940, ch. 120; 1944, ch. 138, § 47.

§ 48:

TAXPAYER TO APPLY FOR LICENSE.—Every person required to obtain a license for the privilege of engaging in any business for which a privilege tax is required, shall make application therefor in writing to the officer who is required to collect the tax. The application for license shall be filed on blanks to be furnished by the state auditor for that purpose, and shall be subscribed and sworn to by the person owning the business, or having an ownership interest therein; or any officer who is required to collect the tax, or his duly authorized agent, may certify to the application. If the applicant is a corporation, a duly authorized agent shall execute the application.

The application shall, in addition to such other information as the officer who is required to collect the tax, may require, show the name of such person or corporation, and in case of a partnership, the name of each partner thereof; the person's, firm's or corporation's business office address,

the location of the place of business to which the license shall apply, and the nature of the business in which engaged, and any other information the officer who is required to collect the tax may require. The application shall contain all the information necessary for the officer collecting the tax to properly classify the applicant and ascertain the amount of tax due.

The application shall be accompanied by the amount of the privilege tax required by law.

Any person who shall willfully make any false statement in an application for a privilege license shall be guilty of a misdemeanor, and upon conviction thereof, shall be required to pay as damages double the amount of the difference between the tax paid and that which should have been paid, in addition to the fine and imprisonment imposed.

It is specifically provided that the officer taking the application for a privilege license shall carefully preserve the same for a period of three (3) years for the use of the grand jury, the courts of the state, or any duly authorized officer of the state of Mississippi, and any officer who shall refuse or fail to take or require the application, or affidavit as herein required, shall be guilty of a misdemeanor and subject to the penalties therefor. (Supersedes § 9667, Code of 1942.) Laws, 1940, ch. 120; 1944, ch. 138, § 48.

§ 49:

LICENSE TO BE ISSUED.—Upon the receipt of the application herein required, and payment of the amount shown thereby to be due for the privilege to be exercised, the officer to whom said application is made shall determine if the application is in proper form, and if the correct amount be tendered, and may require the applicant to furnish such other and further information as in his opinion

is necessary to ascertain the correct amount of tax due. When the correct amount of the tax has been so ascertained, the said officer shall issue to the applicant taxpayer a privilege license according to such application, and shall date the same as of the first day of the month of its issuance. Such license shall be good, usable, and valid for one year after the date thereof, or for such other period as is fixed by law for the privilege, which period shall be so designated in the license. The officer issuing the license shall countersign the same when issued by him, and he shall enter the same in the register prescribed by law therefor. The license issued by collectors as herein provided shall be executed in duplicate, the original shall be delivered to the licensee by the officer, and the duplicate shall be attached to the application therefor, and preserved by the officer as a public record.

If, however, such officer, shall, before issuing the said license, or at any time thereafter, have reason to believe that the statements of the business contained in the application are incorrect or false in any material particular, the said officer shall duly notify the applicant wherein the supposed discrepancy lies, and he is hereby empowered to require the applicant to render such other information as will enable him to determine the proper tax due. After making such determination of the proper tax due, if the license has not been issued, such officer shall forthwith proceed to collect the amount of tax due; and if the license shall have been issued under the original application, he shall collect the difference between the sum shown to be properly due, and the sum paid with the original application, and shall issue an additional license therefor which shall expire at the same time as the original. If the additional tax is paid within thirty days after the determination by the office of the proper amount due, no penalty shall be applied. If the tax-

payer shall wilfully fail or refuse to furnish the information requested by such officer, he shall be liable for damages as in other cases of payment of an insufficient privilege tax, and may be proceeded against civilly or criminally as otherwise provided herein, and shall suffer the penalties provided herein therefor. (Supersedes § 9668, Code of 1942.) Laws, 1940, ch. 120, 1944, ch. 138, § 49.

§ 50:

TAXES REQUIRED FOR SEVERAL BUSINESSES.—All privilege taxes levied and imposed by this act shall be paid in addition to any and all other taxes, and any person pursuing or engaging in more than one of the businesses for which a privilege tax is imposed, shall pay separately the privilege tax imposed upon each separate business so conducted, engaged in, or pursued except as otherwise specifically provided by this act, and if the business made taxable, or the privilege to be exercised, is carried on at two or more separate places, a separate license for each place or location of such business shall be obtained. (Supersedes § 9669, Code of 1942.) Laws, 1940, ch. 120; 1944, ch. 138, § 50.

§ 51:

LICENSE TO BE TAKEN OUT ON INCREASED BUSINESS.—In all cases where a privilege tax is required for carrying on any business in this state, and a privilege license has been obtained for the same, and afterwards during the period covered by said license, the licensee shall desire to increase his business to a classification for which a higher privilege tax is required, he shall before increasing same, procure an additional license, but shall only be required to pay for such additional privilege license on such higher classification; the same to be prorated on the annual

rate according to the number of months unexpired remaining in the period for which the original license was issued, and the additional license shall expire at the same time as the original license. The officer issuing the license shall certify on the face thereof that it is an additional license, and the period for which it is issued. (Supersedes § 9670, Code of 1942.) Laws, 1940, ch. 120; 1944, ch. 138, § 51.

§ 53.

OFFICER TO NOTIFY ALL PERSONS LIABLE FOR A PRIVILEGE TAX.—On or before the first day of each month, the collector shall mail to each privilege taxpayer holding an annual license, and whose license will expire during the following month, as shown by his record, a notice, that the license will expire, and that a new privilege license must be procured during the said following month, and shall enclose therewith an application blank for a new license; but the failure to send or receive such notice shall not exempt such privilege taxpayer from any penalties prescribed by law. Immediately upon a receipt of an assessment by the state tax collector, or the tax commissioner, of privilege taxes due, the collector shall mail to the person liable for the privilege license, or licenses, and damages shown in the assessment, a notice thereof and the person liable for the privilege license and damages named in the assessment shall have ten days, after the notice has been given within which to pay the tax. (Supersedes § 9672, Code of 1942.) Laws, 1940, ch. 120; 1944, ch. 138, § 53.

§ 54.

DAMAGES AND PENALTY FOR FAILURE TO PROCURE LICENSE.—All persons liable for privilege taxes imposed by this act, who shall fail to procure the li-

cense therefor before beginning the business for which a privilege tax is required by this act, or who shall fail to renew, during the month in which it is due, the license on a business for which he has theretofore procured a privilege license, shall, in each or either instance, be liable for the amount of the tax required for such business and fifty per centum thereof, and it is hereby made the duty of the commissioner, whose duty it is to collect the tax on such business, to collect the said tax and penalty; and the commissioner, or his duly authorized representative, may make immediate demand upon such dealer for the payment of all such taxes and penalties.

If any taxes and penalties found to be due and not paid on demand, the commissioner, whose duty it is to collect the tax on such business, may forthwith issue a warrant under official seal, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the person owing the tax, found within his county, for the payment of the amount thereof, with added damages, penalties, and costs of entering and executing the warrant, and to return such warrant to the commissioner and pay to him money collected by virtue thereof, by a time to be therein specified, not more than sixty days from the date of the warrant. The sheriff shall, within five days after the receipt of the warrant, file with the circuit clerk of his county a copy thereof, and thereupon the circuit clerk shall enter in the judgment roll, in the column for judgment debtors, the name of the taxpayer mentioned in the warrant, and in appropriate columns, the amount of the tax, or portion thereof, and damages, for which the warrant is issued, and the date when such copy is filed; and thereupon the amount of such warrant or warrants so docketed shall become a lien upon the title to and interest in the real and personal property, including

choses in action, of the person against whom it is issued, in the same manner as a judgment duly enrolled in the office of such clerk. The sheriff thereupon shall proceed upon the same in all respects with like effect, and in the same manner prescribed by law in respect to executions issued against property upon judgment or attachment proceedings of a court of record; and shall be entitled to the same fee for his service in executing the warrant as now allowed by law for like service, to be collected in the same manner as provided by law for like service.

The commissioner shall issue a separate license for the tax, and for the penalty, and shall endorse across the face of the license issued as a penalty the words: "Collected as damages;" and he shall account for all such penalties as he is required to account for other privilege taxes. In addition to the hereinabove described penalties, the delinquent taxpayer shall be guilty of a misdemeanor, and subject to the penalties therefor. (Supersedes § 9673, Code of 1942.) Laws, 1940, ch. 120; 1944, ch. 138, § 54.

§ 55:

POST LICENSE IN CONSPICUOUS PLACE, OR EXHIBIT SAME.—Each privilege license issued shall be kept posted in a conspicuous part of the place of business of the person to whom such license has been issued where the business carried on has a permanent location, and if the business is such that the license cannot be so posted, then the licensee shall have such license in his actual possession at the time of carrying on such business or doing the act named. In all cases where the question arises as to whether a privilege license has been procured, the license or record thereof, if in existence, shall be the only evidence of payment.

When a proper holder of a privilege license to engage in any business at any definite location in a county desires to remove same to another location in the same county, the tax collector shall upon proper application in writing by the licensee, grant to such person the right to make such move, and shall endorse upon the said license his approval of the change in location. (Supersedes § 9674, Code of 1942.) Laws, 1940, ch. 120; 1944, ch. 138, § 55.

§ 56:

LICENSE TO BE A PERSONAL PRIVILEGE.—The privilege license herein provided shall be and constitute a personal privilege to the person named therein to conduct the business specified in the license, and shall not be transferable to any other person, and shall be construed to limit to the county and location specified therein the person named in the license in conducting the business and exercising the privilege named, unless otherwise provided by this act, and such license shall not exempt from taxation any property used in the business except as specifically provided by law.

No change in the name of the firm, nor the taking in of a new partner, nor the withdrawal of one or more members of the firm shall be considered as commencing business; but if any one or more of the partners remain in the firm, the business shall be regarded as continuing. (Supersedes § 9675, Code of 1942.) Laws, 1940, ch. 120; 1944, ch. 138, § 56.

§ 66:

PENALTIES.—Any person violating any of the provisions of this chapter shall be guilty of a misdemeanor and on conviction thereof shall be fined not more than $500.00

or imprisoned in the county jail not exceeding six months, or by both such fine and imprisonment in the discretion of the court within the limitations aforesaid; and such fine and imprisonment shall be in addition to any other penalty imposed by any particular section of this act. The courts of the county in which the offender resides, or if a company, in which it carries on business, shall have jurisdiction to enforce this section. And persons failing to pay the privilege taxes imposed by this act, and to obtain a license as hereby required, but pursuing the business for which a privilege tax is imposed without procuring such license, may be proceeded against by suit, in addition to being dealt with criminally; and the officer required to collect the tax may seize and sell any property of such person liable for such tax and penalty, in the same manner as he may distrain and sell property of other taxpayers delinquent for the payment of ad valorem taxes due on personal property. (Supersedes § 9690, Code of 1942.) Laws, 1940, ch. 120; 1944, ch. 138, § 66.

§ 9313 (1942):

There is hereby imposed, * * * a franchise or excise tax upon every corporation, * * *, now existing in this state, or hereafter organized, created or established, under and by virtue of the laws of the State of Mississippi, equal to $1.50 for each $1,000.00 or fraction thereof, of the value of the capital used, invested or employed in the exercise of any power, privilege or right enjoyed by such organization within this state, except as hereinafter provided. It being the purpose of this section to require the payment to the state of Mississippi, this tax for the right granted by the laws of this state to exist as such organization, and enjoy, under the protection of the laws of this state, the

powers, rights, privileges and immunities derived from the state by the form of such existence.

§ 9314:

For the year 1940 and annually thereafter, there shall be and is hereby imposed, levied and assessed upon every corporation, association or joint stock company, as hereinbefore defined, organized and existing under and by virtue of the laws of some other state, territory or country, or organized and existing without any specific statutory authority, now, or hereafter doing business within this state, as hereinbefore defined, a franchise or excise tax equal to $1.50 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed within this state, except as hereinafter provided. It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state.